No. 14,558

United States Court of Appeals

For the Ninth Circuit

HENRY THOMAS,

Appellant,

vs.

HARLEY O. TEETS, as Warden of the California State Prison at San Quentin, California,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLEE'S BRIEF.

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Chief Assistant Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
600 State Building, San Francisco 2, California,
Attorneys for Appellee.

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STATEMENT OF THE CASE.

On August 29, 1951, two days before the date set for his execution, petitioner applied for a writ of habeas corpus in the United States District Court. This petition was denied on August 30, 1951. (See Tr. Cir. Ct. 13134, R. 13.)

On August 31, 1951, Thomas applied to William Denman, Chief Judge, United States Court of Appeals, for a certificate of probable cause and for stay of execution pending appeal from the order of the

District Court denying the writ of habeas corpus. The certificate and stay were granted. (*Thomas v. Duffy,* 191 F. 2d 360.) On the same date a notice of appeal and an amended notice of appeal were filed by counsel appointed by Judge Denman. (R. 18, 19.)

This Court reversed the order dismissing the petition and ordered the District Court to entertain the petition on the merits. (*Thomas v. Teets,* 205 F. 2d 236.)

On May 19 and 20, 1954, the United States District Court, Judge Harris presiding, heard evidence on behalf of the petitioner and the respondent. (T. 15.)

On August 7, 1954, Judge Harris dismissed the petition and discharged the writ. (T. 21-23.)

A certificate of probable cause and stay of execution was granted by Judge Harris (T. 26) and a notice of appeal was duly filed. (T. 28.)

STATEMENT OF FACTS.

1. Facts recited in the petition.

The petition for the writ of habeas corpus which was subsequently utilized as a traverse to the return alleged the following facts:

(a) The sheriff told appellant that he did not have a chance if he went before a jury, that if he pleaded guilty the judge would give him a life sentence, that if appellant did not cooperate he (the sheriff) might let word get around and some people might not wait for a trial but might come and string him up, and

that if he cooperated and did like the sheriff said and plead guilty and not cause anybody any trouble he (the sheriff) would promise to get appellant life;

(b) The attorney appointed by the trial Court to represent him told appellant that he heard about appellant's case, that appellant was guilty, that the only thing for appellant to do was to plead guilty, that if appellant went before a jury he would be sure to get gassed, that if he pleaded guilty he (the attorney) thought the judge would give appellant life, that he (the attorney) knew the judge, would talk to the judge and that the judge would surely give appellant life if he pleaded guilty and saved everybody a lot of trouble and the county the expense of a jury trial;

(c) In reliance upon these promises of the sheriff and the attorney, appellant kept his mouth shut;

(d) The court-appointed attorney, on the day set for the entry of appellant's plea, went into the judge's chambers (without appellant) with the district attorney during a recess and after they emerged therefrom appellant was told by the district attorney in the presence of his attorney that if appellant fought the case he (the district attorney) was going to get appellant gassed, but that he would not ask the judge to gas him if he pleaded guilty, and appellant's attorney nodded his head that was what would happen;

(e) Appellant did not learn what had transpired in the judge's chambers until after his automatic appeal to the Supreme Court of the State of California and not until he had sent for and received a transcript of the proceedings;

(f) In the session held in the judge's chambers in the absence of appellant, the judge told appellant's attorney that he would give appellant the gas if he pleaded guilty;

(g) Appellant's court-appointed attorney never said a word to him in court as to what had transpired in chambers and never told him that the judge had so warned the attorney;

(h) Appellant only pleaded guilty because he was promised life and scared out of pleading not guilty and that had he known the true facts he would have had a jury trial;

(i) Not one word was uttered in his behalf throughout the proceedings.

2. Facts determined at the hearing.

The evidence at the hearing included the transcript of the proceedings in the California Superior Court in reference to petitioner's guilty plea, and the testimony of Henry Thomas, the petitioner, Mark Brawman, the Court-appointed attorney for petitioner, Ben Richardson, the sheriff, and Raymond McCarthy and Kent Horton, Special Agents of the California Department of Justice.

Resolving conflicts in the testimony in favor of the trial court's determination we have the following set of facts:

Ben Richardson, who was sheriff of Siskiyou County at the time of Thomas' arrest and plea, testified that he did not tell Thomas to cooperate or he would be strung up, nor did he make any statements to

that effect. (R.T. 139-140.) Richardson did not tell Thomas that he had no chance with a jury or that if he had a jury he couldn't miss getting gassed. (R.T. 140.)

Mark Brawman, Thomas' attorney, testified that after being appointed counsel he read the transcript of the preliminary hearing and then held a conference with his client. (R.T. 90:21.)

Brawman asked Thomas about his case. Thomas told him that he was guilty. Brawman then asked him to simply tell what happened, give the facts, and that he, Brawman, could draw his own conclusions as to whether or not Thomas was guilty. Thomas then proceeded to tell what happened. (R.T. 91:6-15.) Thomas stated that he and one Willie McCain had discussed pulling a stickup or holdup, that they procured some pistols, and drove to a store near Tule Lake. Mr. Brawman was not sure whether Thomas stated that they entered the store with the pistols in their hands. Willie McCain got in a scuffle with the man in the store, the pistol that McCain had was discharged. Thomas stated that when he heard the shot he got excited and pulled the trigger, but that he didn't intend to kill Mrs. Ainsworth. (R.T. 92.)

Mr. Brawman further asked him about the confession he had made to the officers. He asked whether the officers had abused or mistreated him in any way. Thomas stated that he had not been in fear in any way at the time he gave his statement. Thomas stated that the officers had treated him well. Mr. Brawman told him at this time that the only question that would

jury to find him guilty, but that he could feel sure that he would be found guilty of murder.

"I went on to explain to him that in addition to that it required the unanimous verdict of the jury as to the punishment, whether it would be life imprisonment or the death penalty. I told him that that was where the odds were in his favor because if there happened to be one person on the jury who did not want to give the death penalty, why, it would be possible that he would not receive the death penalty, that all we would have would be life imprisonment.

"I also told him that he must realize his position in this case, that is, that he was a colored man, he was charged with shooting and killing a white woman in the perpetration of a robbery and this was one of the cow counties of Siskiyou County, that it is hard to tell whether a jury would be prejudiced against him because he happened to be a colored man. That is why I wanted his opinion as to what he would like to do; although I again repeated that it was *my advice to plead him not guilty* and stand trial before a jury, that that did not mean that he would be acquitted of the charge, but simply that he would have a chance of escaping the death penalty.

"I might say, yet, that Mr. Thomas, all the times that I talked to him, gave me the impression of being a very intelligent person. . . . That is why I asked him to think about it, and he did. He sat there with his head down and I could see that he was reflecting and thinking very deeply of it.

". . . Mr. Thomas didn't reply to that but he still was silent, he was thinking. Finally he said,

'Well, I might just as well get it over. ' He said, 'I might just as well go in and plead before the judge.'

"I said, 'Well, that is what you want to do, it's all right, because I can't tell you not to do that and then plead guilty before a jury.'

"And if a jury should impose the death penalty, why, then, I just wouldn't know what to do about it, I would feel bad. I didn't tell him that, really, but that is what was in my mind, that I would feel bad about it, that I had advised him after he had wanted to plead before the judge.

"However, when he stated that he wanted to plead before the judge, I again told him that was not my advice, but that I did not feel that I should overrule his decision because of the thing that was involved, that it was his life. I told him that it was his life that was in the balance, I wanted him to make the decision which way it should go." (R.T. 96-99. Also see R.T. 118, 119.)

The sheriff who was present at this conference substantiated the testimony of Brawman. Richardson testified that Mr. Brawman told Thomas that the judge was not in a receptive mood for a guilty plea and that such a plea would probably not get any consideration from the Court. (R.T. 138:1; 139:3.)

Thomas admitted that he knew that he was charged with having shot and killed the lady in the store. He knew that he entered a plea of guilty to that charge. He knew at the time he entered the plea of guilty, that murder was punishable by either death or life imprisonment. He was aware that one of the punish-

ments prescribed by law for murder was death at the time of his plea. (R.T. 56-57.)

The defendant entered a plea of guilty. At the time set for determining the degree of the offense, Mr. Ainsworth the husband of the deceased woman, testified to the fact of the robbery-murder. The defense counsel declined to cross-examine because the story of Mr. Ainsworth was as the defendant told it to the defense counsel. (R.T. 115:22.)

At this time the Court stated, "That is all." This action on the part of the Court was one of the grounds urged on appeal to the California Supreme Court. (R.T. 124:19-23.)

Mr. Raymond McCarthy, Special Agent for the California Department of Justice, testified that he and the sheriff returned Mr. Thomas and Willie McCain to Siskiyou County. (R.T. 146:23.)

During the course of this trip Thomas asked McCarthy whether a plea of guilty by Thomas would assist McCain in his case, inasmuch as McCain had just recently been married and he (Thomas) had no burdens to be contended with. (R.T. 147:12.) McCarthy stated that he didn't know how the Court would accept such a plea. (R.T. 147:19.)

SUMMARY OF ARGUMENT.

I.

The evidence clearly supports the District Court's determination that petitioner's plea was not induced by threats of lynching or promises by the sheriff.

II.

The evidence clearly supports the District Court's determination that Thomas' counsel fully advised him of the purport of the judge's statements in the chamber prior to his plea.

III.

The question concerning the trial judge precluding defense counsel from introducing mitigating circumstances was properly resolved by the District Court.

IV.

The District Court ruled correctly on the question of the alleged incompetency of counsel.

ARGUMENT.

I.

THE EVIDENCE CLEARLY SUPPORTS THE DISTRICT COURT'S DETERMINATION THAT PETITIONER'S PLEA WAS NOT INDUCED BY THREATS OF LYNCHING OR PROMISES BY THE SHERIFF.

Petitioner alleged that his plea of guilty was coerced, induced by threats of the sheriff. He alleged that the sheriff threatened him with a lynching unless he cooperated and entered a plea of guilty. Petitioner also alleges that the sheriff promised to obtain a life sentence for the petitioner if he entered a plea of guilty.

Thomas testified to these facts at the hearing. The statement by counsel for petitioner that there were

some conflicts between the testimony of Thomas and the testimony of the witnesses for respondent is an understatement.

Sheriff Richardson stated he at no time had threatened the defendant that he must cooperate or be strung up. Richardson made no statements at all to that effect. (R.T. 139-140.)

Richardson did not tell Thomas that he had no chance with the jury or that if he had a jury he couldn't miss getting gassed. (R.T. 140.)

Likewise Sheriff Richardson did not tell Thomas to keep his mouth shut, or did he tell him that he (Richardson) would talk to the judge and try to get Thomas a life sentence. (R.T. 140.)

That Sheriff Richardson did not make such promises, statements, or threats is clearly shown by the record. (R. 139-140.)

II.

THE EVIDENCE CLEARLY SUPPORTS THE DISTRICT COURT'S DETERMINATION THAT THOMAS' COUNSEL FULLY ADVISED HIM OF THE PURPORT OF THE JUDGE'S STATEMENTS IN THE CHAMBER PRIOR TO HIS PLEA.

Petitioner alleged and Thomas testified that his attorney did not inform him of the judge's statement in the chamber that he would be inclined to give the death penalty whether or not a plea were entered.

The evidence clearly shows that the defendant was advised of the purport of the judge's statement to the

effect that he was inclined to give the death penalty, though the judge would not commit himself definitely.

Further, petitioner was fully advised of his rights to a jury trial and of the fact that one juror could prevent conviction and that one juror could block the death penalty. (R.T. 97:20.) In fact petitioner's counsel had at this time advised him not to enter a plea of guilty, but stated that the decision was for Thomas to make. (R.T. 98:10.)

The testimony also shows that petitioner Thomas had previously indicated that he wanted to enter a plea of guilty. He asked Mr. McCarthy, the Special Agent who transported him back to Siskiyou County, whether a plea of guilty would help McCain, Thomas' co-defendant, with his case, since McCain was just recently married and he (Thomas) didn't have a like burden. (R.T. 147:12.)

Thus, the evidence clearly shows that defendant was advised of the judge's statement in the chamber concerning his inclination to give the death penalty, and that he was advised as to his right and possible chances before a jury. Thus, it appears that Thomas, on being fully informed of the judge's attitude and his rights to a jury, voluntarily and of his own free will entered a plea of guilty.

III.

THE QUESTION CONCERNING THE TRIAL JUDGE PRECLUDING DEFENSE COUNSEL FROM INTRODUCING MITIGATING CIRCUMSTANCES WAS PROPERLY RESOLVED BY THE DISTRICT COURT.

1. The question of the trial judge's alleged preclusion of defense counsel was not before the District Court in this proceeding.

The petition does not allege a violation of due process based upon the preclusion of defense counsel from presenting mitigating circumstances at the hearing to determine petitioner's sentence.

Even assuming it was properly raised by the petition, the District Court properly exercised his discretion in dismissing this allegation. This could be properly based on the fact that the State Supreme Court determined this question on the record. See *People v. Thomas,* 37 Cal. 2d 74. A District Court may properly rely upon the record and determination by a state Court. See *Brown v. Allen,* 344 U.S. 443, 463, 503-507.

Furthermore, this Court determined that the petition stated a cause for relief on the theory that the sheriff induced the guilty plea by threats and promises and that the participation of defense counsel did not operate as an insulator between the sheriff's conduct and the plea. This resulted from the defense counsel's alleged failure to inform petitioner of the judge's statements concerning the death penalty. *Thomas v. Teets,* 205 Fed. 2d 236. Thus the only question before the District Court was whether petitioner's plea was induced by the sheriff's statements and further encouraged by defense counsel's failure to inform peti-

tioner of the judge's attitude. These questions have been resolved against petitioner upon the evidence.

2. The trial judge was fully informed of the circumstances of the shooting.

The judge stated in the conference at the judge's chamber that he had read the transcript of the preliminary examination. (R.T. 49.) This transcript contained references to the scuffle between McCain, petitioner's co-defendant, and the store owner, the shooting by McCain, and the subsequent shooting by petitioner.

Furthermore, Brawman, petitioner's defense counsel, testified that he had informed the judge of these facts in his first conference and further that he had informed him that when Thomas heard the shot from McCain's gun, Thomas got excited and pulled the trigger, but did not intend to shoot anyone. (R.T. 117:9-17.)

Thus it appears that the judge was in fact fully informed of mitigating circumstances.

IV.

THE DISTRICT COURT RULED CORRECTLY ON THE QUESTION OF THE ALLEGED INCOMPETENCY OF COUNSEL.

1. The question of incompetency of counsel was not before the District Court.

The petition, which later became the traverse, does not contain an allegation that petitioner was denied due process by reason of incompetent counsel. This

is an allegation which petitioner's counsel seeks to read into the traverse as an afterthought.

The allegations of the petition, presently the traverse, have been before this court. This court determined that the allegations of the petition stated a cause for relief on the theory that the threats and promises of the sheriff induced the guilty plea. This court further stated that the alleged concealment by defense counsel of the statement of the judge that he would be inclined to give the death penalty, was "an answer to the possible contention that the act of the sheriff was not the proximate cause of Thomas' plea of guilty. . . ." *Thomas v. Teets,* 205 Fed. 2d 236.

This decision is the law of the case and determinative of the effectiveness and interpretation of the allegations of petitioner's traverse.

2. Petitioner's argument concerning incompetency of defense counsel is without merit.

(a) Defense counsel fully informed the trial judge of the circumstances of the killing.

Defense counsel, Mr. Brawman, testified that he did not cross-examine Mr. Ainsworth at the hearing to determine the degree of the offense since his testimony coincided with Thomas' story. (R.T. 115:22.)

Defense counsel further stated he felt he was precluded from adding anything by the judge's remark that he had heard enough.

Nevertheless, in a prior conversation with the judge defense counsel had pointed out to the judge that a scuffle occurred between McCain and Mr. Ainsworth,

that McCain's gun was discharged, and that this excited Thomas and he pulled the trigger of his gun but did not intend to shoot or to kill anyone. (R.T. 117: 9-17.)

(b) The record does not establish that defense counsel's representation was a farce, a sham, or a mockery of justice.

Petitioner would lead one to believe that any action of defense counsel, which can be termed a mistake in light of omniscient hindsight, establishes incompetency of counsel and a violation of due process.

The proper rule is that the representation of counsel, if it is to be of such low caliber as to amount to a lack of due process, must be such that the trial is a farce, a sham, and a mockery of justice.

Discussing the requirement of counsel, Mr. Justice Minton, in *U. S. v. Ragan,* 7 Cir. 1948, 166 F. 2d 976, 980, pointed out that petitioner's counsel was an old man and that there was considerable evidence of inefficiency. Mr. Justice Minton stated as follows:

> "Whenever the Court in good faith appoints or accepts the appearance of a member of the bar in good standing to represent a defendant, the presumption is that such counsel is competent. Otherwise, he would not be in good standing at the bar and accepted by the Court. The constitutional requirements have been met as to the necessity of counsel. If the action of counsel in the presence of the Court in the conduct of the trial reduces the trial to a travesty of justice, such action might be considered on the presumption that such a trial was a denial of due process. The

conduct of counsel in the trial of a case is that of only one of the officers of the Court whose duty it is to see that the defendant receives a fair trial. He is only one of the actors in the drama. The best of counsel makes mistakes. His mistakes, although indicative of lack of skill, or even incompetency, will not vitiate a trial unless on the whole representation is of such low caliber as to amount to no representation and reduce the trial to a farce. A fair appraisal of the record in this case does not remotely approach such a state."

This statement of the rule is essentially followed in the following cases.

Diggs v. Welch (D.C. 1945), 148 F. 2d 667; *Merritt v. Hunter* (10th Cir. 1948), 170 F. 2d 739; *Morton v. Welsh* (4th Cir. 1947), 162 F. 2d 890; *Carmody v. Cox* (8th Cir. 1943), 138 F. 2d 786; *Dorsey v. Gill* (D.C. 1945), 148 F. 2d 857.

Some of the reasons for this rule were discussed in *Diggs v. Welch,* supra, p. 669.

"The result of such an interpretation would be to give any federal prisoner a hearing after his conviction in order to air his charges against the attorney formerly representing him. It is well known that the drafting of petitions for habeas corpus have become a game in many penal institutions. Convicts are not subject to the deterrence of prosecution for perjury and contempt of Court which affect ordinary litigants. The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner.... To allow a prisoner to try the issue of the effectiveness of his counsel under a liberal definition of that

> phrase is to give every convict the privilege of opening a pandora's box of accusations which trial courts near large penal institutions would be compelled to hear. . . . For these reasons we think absence of effective representation of counsel must be strictly construed. It must mean representation so lacking in competence that it becomes the duty of the court or the prosecution to observe it and correct it. . . . They are all cases where the circumstances surrounding the trial shock the conscience of the court and made the proceedings a farce and a mockery of justice." (P. 470.)

The facts in the present case certainly do not indicate that Thomas' trial was a farce or a mockery of justice. Defense counsel testified that he did not cross-examine Mr. Ainsworth because Mr. Ainsworth told the identical story that Thomas had told him. Further it appears that defense counsel was aware of the fact the judge had read the preliminary examination and was familiar with the mitigating circumstances in this case. Furthermore, it appears that the defense counsel had related to the trial judge the mitigating circumstances in a conference with the judge. He told the judge that there was a scuffle between McCain and Ainsworth and McCain's gun went off and as a result Thomas got excited and pulled the trigger of his gun. The judge was informed that Thomas did not intend to shoot or kill anyone.

The district judge properly concluded that this question was not before the District Court, and that if it were before the District Court, it was unmeritorious.

CONCLUSION.

For the foregoing reasons we respectfully submit that the discharge of the writ of habeas corpus be affirmed.

Dated, San Francisco, California,
February 4, 1955.

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Chief Assistant Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
Attorneys for Appellee.